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No. 91-687

In The

Supreme Court of the United States

October Term, 1991

STATE OF MONTANA,

Petitioner,

v.

DONALD GLENN IMLAY,

Respondent.

On Writ Of Certiorari To The
Montana Supreme Court

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

WHETHER A PROBATIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT IS VIOLATED BY COMPELLING THE PROBATIONER, AS A CONDITION OF A SUSPENDED SENTENCE, TO ADMIT THAT HE IS GUILTY OF THE CRIME FOR WHICH HE HAS BEEN ACCUSED AND CONVICTED?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Montana Code Annotated Section 45-7-201

Perjury. (1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material.

2. Montana Code Annotated Section 46-18-112

Content of Presentence investigation report. Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

(a) The defendant's characteristics, circumstances, needs and potentialities.

3. Rule 59(b). Time for motion. A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgments.

4. Rule 60(b) of the Montana Rules of Civil Procedures.

Mistakes, – inadvertence – excusable neglect – newly discovered evidence-fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time for a new trial under Rule 59(b).

STATEMENT OF THE CASE

Respondent Imlay agrees with the Petitioner's statement of the case with the exception of the following. The Court, after reviewing the pre-sentence report sentenced Respondent Imlay to five years probation upon the condition that he successfully complete a Sexual Offender Program. Respondent Imlay was seen by Therapist, Michael Sullivan in Billings, Montana, on six separate occasions. However, he was denied admission into the Sexual Offender Program solely because he refused to admit his guilt. (Tr. at 12.) Each of the six times that Respondent Imlay saw Therapist Sullivan the meeting was initiated by Respondent. (Tr. at 7.)

Respondent Imlay was never placed on a regular counselling schedule, nor was a formal plan devised to address his state of denial even though he attended each of the scheduled appointments, was always punctual and pleasant. (Tr. at 15.) After being rejected by the Billings program, Respondent attempted to enroll in another Sexual Offender Program located in Helena, Montana. However, he was again rejected for the same reason. (Tr. at 20.)

During the Revocation Hearing, Barbara Nihill, Respondent's Probation Officer, testified that denial is 75% of a sexual offender's rehabilitation process. (Tr. at 24.) Therapist Sullivan would not quantify the relationship of denial with rehabilitation. However, Sullivan did testify that accepting responsibility played an important part in the rehabilitation process. (Tr. at 12.) Sullivan testified further that there was a danger that Mr. Imlay would re-offend if left untreated. This was contrary to the findings of the court at the original sentencing. The court

stated at the original sentencing, after hearing all of the testimony at trial that it did not feel Respondent would re-offend.[1]

SUMMARY OF THE ARGUMENT

The right to remain silent has long been recognized as one of the great landmarks in man's struggle to make himself civilized. The Fifth Amendment right against self-incrimination has applied to the Federal Government since the inception of the Bill of Rights. It was made applicable to the states in *Mallory v. Hogan,* 378 U.S. 1 (1964). As this right evolved, the Second Circuit was later required to decide what kind of statement was necessary to trigger this Fifth Amendment protection. In deciding this issue, the Court in *Richard Roe v. United States,* 847 F.2d 1024, 1028 (2nd Cir. 1988) stated that in order to invoke the Fifth Amendment right against self incrimination, a defendant's statement must exhibit three qualities: (1) there must be testimonial communication; (2) it must be made by compulsion; and (3) it must be incriminating in nature.

The probation condition placed on Mr. Imlay to enroll and successfully complete a Sexual Offender Program by the trial court exhibits all three required elements necessary to invoke the Fifth Amendment right

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[1] No transcript was made of the original trial because Imlay did not appeal the original sentence. The court's statement regarding the chance of Respondent re-offending is repeated to the court by Respondent's attorney and is located in the revocation transcript on pages 59-60.

against self incrimination. First, the court was aware at the time of the original sentencing that the treatment program was not amenable to offer treatment to a man who maintains his innocence; second; that Respondent would have had to admit his guilt before he could comply with the condition of his probationary sentence, and third, the admission of guilt would be compelled, failure to be accepted into the Sexual Offender Program would mean Mr. Imlay would face the much harsher punishment of going to prison. There is no dispute regarding Respondent's willingness to enroll in a Sexual Offender Program. Furthermore, the District Court in its original order found that Respondent was not a danger to reoffend. Therefore, the only reason Respondent was found in violation of his probationary sentence and sent to prison was because he could not be accepted into any Sexual Offender Program.

The possibility of Respondent incriminating himself by admitting guilt stems from the fact that since he had maintained his innocence throughout his criminal proceedings, for him to now admit guilt would not only subject him to possible criminal prosecution for perjury, but he would also be giving up his right to seek Post-Conviction relief in the form of newly discovered evidence available to him by way of Rule 60(b), (2) of the Montana Rules of Civil Procedure. Respondent's reason for maintaining his innocence, even though required to serve time in prison, is that he hopes the victim will eventually come forward and recant her prior testimony and exonerate him. This form of newly discovered evidence would have no value to Respondent once he admits his guilt.

Whether or not there is a need for a Rehabilitation Program such as a Sexual Offender Program was not an issue before the Montana Supreme Court and the *Imlay* decision was not based on this issue. The Montana Supreme Court based its decision on the fact that the District Court erred in imposing such a condition on a probationary sentence when it was clear from the Pre-Sentence Report that Respondent was not amenable to treatment due to his denial. The Montana Supreme Court also found that as a result of this sentence, the District Court had demanded a price from the Respondent in exchange for the probationary sentence that was given to him. The price for remaining free on probation demanded that he waive his Fifth Amendment right to self-incrimination and successfully complete the Sexual Offender Program.

The *Imlay* case is being compared by the Montana Attorney General with an inmate's case who is required to complete a Sexual Offender Program while in prison. However, the two cases cannot be compared. An inmate who is required to complete the Sexual Offender Program in prison before being eligible for parole is in a different situation than is Respondent. The inmate's failure to complete the program only means that he would not be eligible for parole due to the noncompletion. However, a revocation of Respondent's suspended sentence because he would not waive his Fifth Amendment right against self incrimination resulted in a deprivation of Respondent's freedom.

ARGUMENT

I. A PROBATIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS VIOLATED BY IMPOSITION OF A PROBATION CONDITION WHICH COMPELS PROBATIONER TO PARTICIPATE IN A SEXUAL OFFENDER PROGRAM WHEN THE PROGRAM REQUIRES HIM TO ADMIT GUILT IN ORDER TO PARTICIPATE.

The discretion of the sentencing judge to decide the most appropriate sentence is not normally an issue. In Mr. Imlay's case, as in other cases, the major concern is rehabilitation. This was the reason for the initial sentence and, ultimately, was the reason for the revocation. However, placing Respondent on a probationary sentence with the condition that he successfully complete a Sexual Offender Program, when the court was aware from the Pre-Sentence Report that the treatment program was not amenable to treating a person in denial, constituted a violation of Respondent's Fifth Amendment right against self-incrimination. Pursuant to the three qualities stated by the Court in *Richard Roe v. United States, supra,* not only was Respondent being compelled to admit his guilt by being forced to enroll and complete the program, such an admission on his behalf would negate any chance he has of later being found innocent of the offense through newly discovered evidence. Furthermore, his admission could possibly cause a charge to be brought against him for perjury. The district court should have been aware of the violation of Respondent's right at the time of sentencing.

Montana Code Annotated Section 46-18-112 states in pertinent part that whenever a pre-sentence investigation

is required, the probation officer shall promptly inquire into and report upon the defendant's characteristics, circumstances, needs and potentialities. This report was completed and provided to the court before sentencing. The court's failure to take this information under consideration at the time of sentencing and when later revoking Respondent's probation shows a total disregard for Respondent's Fifth Amendment right and the decisions of the Court in *Thomas v. United States*, 368 F. 2d 941 (5th Cir. 1966), *Poteet v. Feuver*, 517 F. 2d 393 (3rd Cir.1975), *Fox v. State*, 569 P. 2d 1335 (Alaska 1977), *United States v. Garcia*, 544 F. 2d 681, 685 (3rd Cir.1976), *United States v. Acosta*, 509 F. 2d 539 (5th Cir.1975) and *United States v. Rogers*, 504 F. 2d 1079, 1085 (5th Cir.1975).

This Court stated in *United States v. Stockwell*, 472 F. 2d 1186, *cert. denied*, 411 U.S. 948, 36 L. Ed. 409, 93 S. Ct. 1924 (1973), that, "a defendant retains his Fifth Amendment rights after a jury verdict because the appellate process is still open to him, and that an enhanced sentence, solely for the reason that the defendant maintained his innocence, cannot stand." Even though Respondent's case was not on appeal at the time he attempted to comply with the condition of his probationary sentence, this should not be considered a waiver of other Post-Conviction rights available to Respondent.

A. Newly discovered evidence was one of the Post-Conviction reliefs available to Respondent at the time he was being compelled to admit guilt.

One form of Post-Conviction relief that is available to Respondent is newly discovered evidence which could

possibly exonerate him. The choice between probationary freedom and incarceration, for one who has maintained his innocence from the outset, is not an easy choice. However, if Respondent capitulates to the demand of the court and admits guilt, he would not only give up his chance of being exonerated, but he could also be charged with perjury for lying to the court during his testimony at trial.

The Montana Supreme Court's interpretation of a defendant's Fifth Amendment right against self incrimination is in total agreement with the decision in *United States v. Rodriguez*, 498 F. 2d 302 (5th Cir. 1974), in which this Court stated that, "a defendant retains important Fifth Amendment rights after the jury reaches a verdict, rights which must not be made the price of sentencing leniency. The court cannot place the defendant in the dilemma of either abandoning his rights or risking a harsher sentence." One of the rights that is available to Respondent is the right to motion the court to set aside the sentencing order if newly discovered evidence became available. Pursuant to Rule 60(b), (2) of the Montana Rules of Civil Procedure, Respondent would be able to set aside his conviction if "newly discovered evidence becomes available which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b)." By exercising his Fifth Amendment right against self-incrimination, the Respondent retains the ability to be exonerated if the victim comes forward and recants her testimony. On the other hand, if he admits guilt in order to comply with his probationary sentence and remain out of prison, he would have little or no chance of being exonerated, even if at a later date, the

victim would come forward and recant her prior testimony. The court would look upon the victim's recantation with some skepticism if it came after Respondent had admitted guilt in order to be accepted into the Sexual Offender Program. The demand that the district court placed upon Mr. Imlay clearly was a violation of his Fifth Amendment right against self-incrimination because it went against not only the spirit, but also the letter of the law in *Rodriguez, supra.*

B. Any admission of guilt by Respondent which contradicts his testimony at trial would subject him to criminal prosecution for perjury.

The condition placed on Respondent's probationary sentence that required him to successfully complete a Sexual Offender Program meant that he would have to admit guilt, which would have been contradictory to the testimony he gave under oath at trial. It also meant that he could possibly be charged with perjury for lying under oath. According to Montana Code Annotated Section 45-7-201, "a person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material."

In *Blair v. United States,* 250 U.S. 273 (1919), the United States Supreme Court stated that, "among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or

before grand juries or agencies." However, the Court went on to state that, "the power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty. The most important of which is the Fifth Amendment privilege against compulsory self-incrimination." The United States Supreme Court in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), made it clear that the right against self-incrimination reflects our fundamental values and aspirations, and marks an important advance in the development of our liberty. The Court, in *Murphy, supra*, also stated that this right can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory.

In analyzing the policies of the right against self-incrimination, the United States Supreme Court in *Ullmann v. United States*, 350 U.S. 422, 426 (1964), stated that, "The privilege against self-incrimination registers an important advance in the development of our liberty . . . 'one of the great landmarks in man's struggle to make himself civilized.' " The fact that the district court demanded that Respondent Imlay give up such an important right, demonstrates the lack of the court to understand that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.

CONCLUSION

The probationary sentence imposed on Respondent Imlay by the district court exhibits all three qualities that the court in *Richard Roe v. United States, supra*, stated are necessary to trigger the Fifth Amendment right against

self-incrimination. By ordering, as a condition of probation, that Respondent Imlay successfully complete a Sexual Offender Program, he would be required to admit guilt. Such an admission would have been compelled and he would be required to give up his right to post-conviction relief, in addition to risking a possible charge of perjury. This is the very dilemma that the Fifth Amendment is intended to guard against.

The Respondent therefore respectfully requests that the decision of the Montana Supreme Court be upheld.

Respectfully submitted,

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